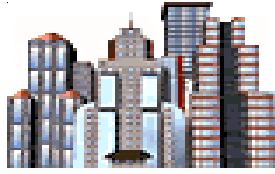


NEWS



BUSINESS LAW

LETTER

MSBA SECTION OF BUSINESS LAW

Vol. Ten No. Two
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<http://www.msba.org>

Chair's Report

By Tea Carnell

Greetings:

For most business lawyers, the year end is quite busy. I hope that all of you are now enjoying an active but manageable January.

The Business Law Section pursued many projects last fall. The revision of the Maryland Joint Report on Lawyers' Opinions in Commercial Transactions is near completion. Since presenting the initial draft of the revised Report in Ocean City last June, members of the Steering Committee have presented MICPEL seminars in Baltimore and Columbia to update business lawyers on the proposed changes to the Report and solicit additional input. The final Report, which will be useful to corporate, real estate, securities, tax, and other business and transactional attorneys, is on target to be published this spring.

Last fall, a Section-wide survey was developed to help the Council better serve its members. We will distribute the survey this month and look forward to receiving your thoughts on the ways the Section may best serve its membership. We are also in the process of working with John Anderson of the MSBA to improve our webpage for enhanced communications.

Our Vice-Chair, Eric Orlinsky, continues to work with MICPEL to develop programs of special interest to business lawyers. Look for upcoming announcements from the Section Listserv and from MICPEL.

Many committees are meeting regularly. Please refer to the roster in this edition of the Newsletter and please feel free to contact the Chairs of the Committees in which you have an interest. On behalf of the Section Council, I encourage you to become more involved in the Business Law Section.

Best regards to all,

Tea Carnell

Steve Mandell

By Allan Hillman, Esq.

Steve Mandell, a superb attorney, valuable and devoted member of the Business Law Section Council, and good friend, passed away on November 22, 2006, after a truly heroic, two year battle with cancer. Steve was born in New Jersey, a fact which he always asked me not to hold against him. He was a magna cum laude college graduate of the University of Richmond (a proud "Spider"), received his law degree from Catholic University, and an LLM in Taxation from Georgetown. He was a partner at DLA Piper US, having joined the firm of Piper and Marbury in 1989 and becoming a partner several years later. He was expert in healthcare, securities, and corporate law and was extremely active in pro bono work for the Maryland Volunteer Lawyers Service.

Many of us knew Steve best as a result of his service on the Business Section Council. He was an active participant and his work led the Executive Committee to nominate him as Secretary, a position he performed without

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The Maryland Biotechnology Tax Credit

By Joseph P. Ward, Esq., and Joseph L. Morales, Esq.
Whiteford, Taylor & Preston, LLP

During the 2005 Maryland legislative session, the state legislature passed the Biotechnology Investment Incentive Act (HB 664), which has been codified as the Maryland Biotechnology Investment Incentive Tax Credit, MD. CODE ANN. TAX-GENERAL §10-725 (2005). The act provides a refundable tax credit of 50% of the "Investment" of "Qualified Investors" who invest in a "Qualified Maryland Biotechnology Company." The tax credit program is administered through the Maryland Department of Business and Economic Development ("DBED") and funded each year through the Governor's budget. During 2006, Six Million Dollars (\$6,000,000) of tax credits were set aside to fund the program (thus supporting \$12,000,000 in investments) and all of those tax credits were subscribed for before the end of the year.

Key Terms

Investment. In order to obtain the credit, a Qualified Investor must make an "Investment," which is defined as "contribution of property, at risk of loss...in exchange for stock, a partnership interest, or other ownership interest in the qualified company." MD. CODE ANN. TAX-GENERAL §10-725(a)(4)(i). Importantly, the investment must be in exchange for equity in the Company. Other investments, such as convertible debt, do not qualify. Practitioners should also note that the equity purchased by the investor must be held for at least 2 years or the credit will be subject to certain recapture rules.

Qualified Investors. The next step in the process is to determine whether the investor qualifies for the credit. The tax credit is available to any individual who invests at least \$25,000, and any corporation who investment at least \$250,000, in a Qualified Biotechnology Company. Individuals and corporations making these investments need not be Maryland residents, and in fact nearly one-third of the Eligible Investments in 2006 were from people or entities domiciled in other states.

An additional class of investor entitled to take advantage of this tax credit is a Qualified Maryland Venture Capital Firm who invests at least \$250,000 in a Qualified Biotechnology Company. A Qualified Maryland Venture Capital Firm is an entity organized for the purpose of investing funds in privately held companies engaged in the research, development, or commercialization of innovative or proprietary technology. *Id.* at §10-725(a)(7). In addition, the firm must: (1) have at least two principals with at least five years

of venture capital experience each; (2) have at least one year of experience investing in biotechnology or biopharmaceutical companies; and (3) have its principal place of business in Maryland. *Id.*

Because the statute does not specifically contemplate investment by limited liability companies, partnerships or any other entity that is not a corporation or a Qualified Venture Capital Firm, DBED has issued guidelines stating that such entities are not entitled to take advantage of the tax credit.

Qualified Maryland Biotechnology Company. The credit is designed for individuals and companies who invest in Qualified Biotechnology companies in Maryland. A Biotechnology Company is a "company organized for profit and primarily engaged in the research, development, or commercialization of innovative and proprietary technology that comprises, interacts with, or analyzes biological material including biomolecules (DNA, RNA, or protein), cells tissues, or organs." *Id.* at §10-725(a)(2). In order to be "Qualified," the company must (1) have its headquarters or base of operations in Maryland; (2) have fewer than 50 employees; (3) have been in active business no longer than 10 years; and (4) be certified as a biotechnology company by the Department. *Id.* at §10-725(a)(6). These requirements illustrate the legislature's intent to favor investment in small business in Maryland.

The Process

The process to obtain the tax credit has many steps. First, the Investor must complete a Qualified Investor application (Form A.1 (for individuals), A.2 (for corporations) or A.3 (for venture funds)) and the Company must complete a Qualified Maryland Biotechnology Company application (Form B). These forms are filed with DBED, and officials meet weekly to review and approve the applications. Within thirty (30) days of receiving a complete application, and assuming the tax credits have not been fully subscribed for, DBED will issue an initial tax credit certificate. The investor will then have thirty (30) days to make the investment in the Company and notice must be sent to DBED by a Proof of Investment Form, along with supporting documentation (such as a cancelled check or wire confirmation) within ten (10) days of the actual investment. Upon receipt of the Proof of Investment Form, DBED will issue a final tax credit certificate.

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Officer Liability for Unpaid Corporate Taxes

By Randy Fisher, Esq.

Practitioners thinking about putting together a legal entity either domiciled in a foreign jurisdiction or in Maryland to operate in a foreign jurisdiction that they are not familiar with local law (much less licensed to practice) should study the case of Allen v. Michigan Department of the Treasury, MTT Docket No. 249514, Assessment Nos. G359968 and G050651, Account Nos. 38-2245122 (Corporate), 415-48-5925 (Individual), 2000 WL 1121394 (Mich. Tax Tribunal, May 1, 2000). In that case, James Allen was assessed by the Michigan Department of Treasury for the unsatisfied single business tax of Mt. Morris Coatings, Inc.

A standard tenet of a practitioner's advice to business clients is to consider setting up a "legal entity" in order to protect themselves from personal liability. Imagine the shock to Mr. Allen when he found out the State of Michigan thought he was personally liable for unpaid fees to the State.

The derivative liability assessments against Allen pertained to three tax years (1989, 1990 and 1991). During a portion of those tax periods, Allen was "President" of the company. The assessments were issued against Allen under the Revenue Act, 1941 PA 122, as amended. Subsection 27a(5) of that act, 205.27a(5): MSA 7.657(27a)(5), added by 1986 PA 58, provides:

If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for making the returns or payments is **personally liable for the failure** (emphasis added). The signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

The issue the Tribunal considered was as follows: "For any or all tax years at issue, was Allen a liable corporate officer who, pursuant to MCL 205.27a(5): MSA 7.657(27a)(5), had 'control or supervision of, or [who was] charged with the responsibility for, making the [tax] returns or payments' which the liable corporation, for which he was employed, failed to pay?" Allen, 2000 WL 1121394, at p. 3.

Allen was able to show that he was a corporate officer *in name only*. Allen either signed, or his signature stamp was used upon, some company tax returns and he apparently signed, and was listed as President, Secretary and/or Treasurer, upon other company documents, including the company's 1989, 1990 and 1991 Michigan Annual Reports. But the court felt, based upon testimony presented by Allen, that he was nothing more than a "corporate bystander, who was completely without knowledge of, and input into, the financial and operational concerns of Mt. Morris Coatings, Inc." Id., at p. 10.

He was able to put on testimony (his own) that showed that he had no "awareness, nor understanding, of the financial condition of the company and no active participation in active management of the company. He testified that he had no supervisory authority over the CPA firm that prepared the company's tax returns; and that the office manager, who he did not supervise, paid company taxes." Id. Allen testified that he "signed anything that was placed before him, or his signature stamp was used in his absence by the office manager who, he explained, was also doing the bidding of Bailey." Id.

The key to this case is that it is one of the few in which a corporate officer of a company that has not paid its state tax to Michigan avoids corporate liability. The depth of evidence, and therefore legal expense, is evident from the full text of the case and the administrative law judge's opinion. The Michigan Treasury Department fought the determination and under cross examination, revealed the type of quagmire that can surround an unwary client.

The case history shows that any petitioner who receives a Notice of Intent to Assess is entitled to an Informal Hearing at the Department level. But in preparation for issuing the Notice and for the Informal Hearing, clerks with no legal training or tax training merely "look for signatures of a person, as an officer, on various documents, such as tax returns, Michigan Annual Reports and applications for registration, before sending out a 'Letter of Inquiry'". The clerk also inputs into whether a Notice of Intent to Assess for officer liability should be issued for any of the Department's various business taxes. Typical sources of tax records are the taxpayers, their representatives, bookkeepers and accountants." Id. at p. 4. When records are received, the department conducts no independent investigation on the role of the indicated signatory. Id.

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The Perils of Online Advertising

By Louis J. Levy

As the Internet expands and revenues from online advertising soar, federal and state authorities have been casting a wary eye on the practices of companies that develop online advertising programs and technology (known as “adware”), not to mention the companies who enlist the services of these companies to distribute advertising. In particular, as a result of escalating consumer complaints, state and federal authorities have brought multiple actions against adware providers, imposing stiff penalties for practices deemed to be unfair and deceptive.

In one of the most recent cases, the Federal Trade Commission (“FTC”) reached a settlement with Zango, Inc., formerly 180Solutions, Inc., whereby Zango will have to pay three million dollars and modify its practices to comply with stringent FTC requirements. A review of the complaint and agreement in this case provides online advertisers with a laundry list of practices to avoid.

By way of background, Zango develops and distributes advertising software programs (a.k.a. “adware”), which are delivered to consumers’ computers via the Internet. This software monitors a consumer’s browsing habits, and generates advertisements, primarily in the form of “pop-up” advertisements, which are related to topics queried by the consumer. According to the FTC complaint, Zango’s software has been installed on the computers of U.S. consum-

ers over 70 million times, and has generated over 6.9 billion pop-up advertisements.

Zango distributes its software through a network of affiliates and sub-affiliates, who bundle Zango’s software with supposedly “free” software (a.k.a. “lureware”), including screen savers, emoticons, and entertainment content. Consumers were not fully or adequately informed that Zango’s software had been downloaded on to their computers, nor could they easily view Zango’s terms of use or privacy policies, which were often buried behind a series of inconspicuous hyperlinks, thereby depriving users of an adequate opportunity to review these policies.

The FTC also alleged that Zango made it difficult for consumers to identify, locate and remove its software from their computers through a variety of techniques, including:

- ♦ Failing to identify the name of the adware in the pop-up advertisements;
- ♦ Misleadingly naming adware files or processes and/or saving them to a variety of locations on the user’s computer;
- ♦ Misleadingly listing the name of the adware in the Windows “Add/Remove” utility;
- ♦ Imposing complicated and protracted uninstall procedures on consumers;

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SECTION OF BUSINESS LAW NEWSLETTER

Maryland State Bar Association

Submissions, questions, comments?

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Online Advertising . . .

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- ♦ Providing uninstall tools that failed to completely remove the adware program; and
- ♦ Installing technology that “silently” reinstalled the adware after the consumer had removed it from his or her computer, often using different, randomly generated file names to thwart detection by anti-spyware programs.

These practices, the FTC alleged, constituted unfair and deceptive practices under the FTC Act.

The Agreement and Consent Order (see <http://www.ftc.gov/os/caselist/0523130/0523130agree061103.pdf>), which was issued on November 3, 2006, forbids Zango from engaging in these practices. In particular, it requires Zango, either directly or indirectly through its affiliates, to obtain a computer user’s affirmative consent prior to downloading its software onto the user’s computer, and to implement a “comprehensive program” that ensures that affiliates obtain the express consent of consumers prior to installing its software.

Zango must also implement a mechanism for receiving and addressing consumer complaints. Consistent with best practices in the online advertising industry, pop-up ads generated by Zango must bear a conspicuous legend identifying the source of the program (i.e., the name of the program generating the program) and instructions for uninstalling the program. Furthermore the uninstall methodology must be clear and straightforward, and *not* require users to download or install any additional software as part of the uninstall process, or to close or deactivate any firewalls, anti-spyware, or anti-virus programs running on the computer.

Zango is also required to pay the FTC three million dollars.

This case has obvious implications for providers of Internet advertising programs. In particular, there is a growing body of law, not to mention a growing consensus within the online community, of acceptable and unacceptable online advertising practices that are reflected in the FTC’s order in *Zango*. Indeed, a growing number of “adware” providers already comply with the requirements mandated by the FTC in this case, i.e., full disclosure prior to installation, easy uninstall procedures, identifying the source of the ads, etc.

Perhaps less obviously, the decision has important implications for the companies that place their ads through adware providers such as Zango. In particular, policy groups such as the Center for Democracy and Technology (“CDT”) have urged advertisers to stop placing advertise-

ments with providers of nuisance adware. Further, as reported by CDT, FTC Commissioner Jonathan Leibowitz has noted that he would urge the FTC to start naming companies whose ads are served by nuisance adware providers if those companies “do not start acting to cut the flow of funds to the makers of nuisance and harmful adware.” See *Following the Money: How Advertising Dollars Encourage Nuisance and Harmful Adware and What Can be Done to Reverse the Trend*, Center for Democracy and Technology, May 2, 2006, at 10 (available at <http://www.cdt.org/privacy/20060320adware.pdf>). Accordingly, advertisers need to exercise vigilance to ensure that the companies they use to place and deliver advertisements via the Internet are complying with industry best practices.

Mr. Levy is a member of the firm Leventhal Senter & Lerman PLLC (www.lsl-law.com), where he specializes in intellectual property, unfair competition, and computer security and privacy issues.

Biotech Tax Credit . . .

(continued from page 2)

Once the final tax credit certificate is issued, the investor will be able to claim a refundable tax credit for 50% of his, her or its investment. The credit may be claimed in a taxable year beginning after December 31, 2006. *Id.* at §10-725(e)(3)(vii). Therefore, those investors investing in 2006 and 2007 will be able to claim the tax credit on their 2007 returns and receive the refund in 2008.

The Future of the Tax Credit

Because the tax credit program is funded through the Governor’s budget, the amount of tax credits set aside each year is subject to change. The recently submitted Governor’s budget again sets aside Six Million Dollars (\$6,000,000) of tax credits. Having successfully gone through this process and seeing first-hand the positive impact it has on generating investments in Maryland biotechnology companies, we are hopeful that the program will continue and, better yet, grow. According to DBED, approximately twenty (20) Maryland biotechnology companies benefited from the tax credit program in its first year. As Maryland fights to maintain itself as a national leader in the biotechnology industry, targeted programs such as this one are key to achieving that goal.

More information on the Maryland Biotechnology Investment Incentive Tax Credit, as well as the application forms, can be found on DBED’s website at www.choosemaryland.org.

Five Tips to Protecting Your Client's Patent Rights

By: William S. Ramsey, Esq.

A client proudly confides: "I have an invention." What do you need to know to best protect his or her rights?

1. It's a federal patent or nothing. There is no common law patent. A trade secret works only if you can keep the invention secret, which is not an option for most inventions.
2. Keep it secret until filing. An application must be filed within one year of public disclosure in order to obtain patent protection and there are advantages in avoiding public disclosure entirely before filing.
3. A separately licensed attorney or agent is necessary. Only a scientist or engineer who has passed a test on patent law can represent clients before the Patent and Trademark Office (e.g. a Registered Patent Attorney if also a lawyer; otherwise a Patent Agent).
4. It's not cheap. Figure \$1,200 in government fees, perhaps \$4,000-8,000 for attorney or agent fees. Each patent application is unique and takes a lot of time to write and prosecute. Obtaining a patent is worth it only if it supports a potentially valuable product or service.
5. Avoid invention promoters. As a rule, invention promotion services at best provide services which no one needs. Have your client join an inventor's club and visit the Patent and Trademark Office website www.uspto.gov.

Steve Mandell . . .

(continued from page 1)

peer. Alas, he became my Vice-Chair just as his illness struck, but he remained interested in the Council, albeit as inactive Vice Chair, for two years.

We all know stories of people who bear up under the burdens of serious illness. Some of us are privileged to have such people as friends and as examples to us all. Steve was such a person. I can recall chatting with him on occasion and he demonstrated that rare combination of hard-headed realism, hope, and good humor that we would all like to show were we so stricken.

After the Council gave him some history books as a present, he read them, and he and I had spirited discussions, as Civil War buffs, about them. All I can say is that Steve convinced me I was wrong about certain things about which I "knew" I was right. About the only thing we agreed on was that John Wilkes Booth was a truly narcissistic character — the precise opposite of Steve Mandell. It would have been impossible to realize from those conversations that Steve had, as he remarked, "a two per cent chance of survival."

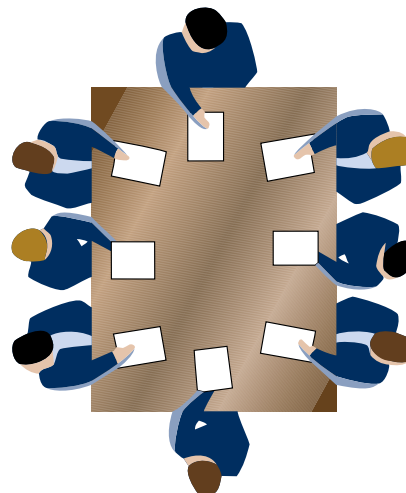
Well, the 98 per cent chance prevailed. But Steve's memory, his work, and his example are inspirations to us.

Our hearts go out to his family. We will honor his legacy if we seek to be best and most honorable lawyers — and people — we can be.

Unpaid Corporate Taxes . . .

(continued from page 3)

In this case, following the informal hearing, the Petitioner then appealed the finding of the Department ruling against the Petitioner. An Administrative Law Judge then reversed the department and ruled in favor of the petitioner. There was a final happy ending for the Petitioner, but the process was one that all legal practitioners should be aware of as well as the consequences of clients operating in foreign jurisdictions.



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COMMITTEE REPORTS

CONSUMER CREDIT AND FINANCIAL INSTITUTIONS COMMITTEE MEETING

“Maryland’s Credit Laws: A Primer, Preemption, and Possible Changes”
discussion led by Marjorie Corwin and Wingrove Lynton

Date: Thursday, January 25, 2007, 12:00 noon – 1:30 P.M.

Location: Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, Third Floor, 233 East Redwood Street, Baltimore, MD 21202.

Lunch will be served for those who RSVP to mcorwin@gfrlaw.com by Tuesday Jan. 23. For directions see www.gfrlaw.com.

To be added to the e-mail distribution list for upcoming meetings, please e-mail Marjorie Corwin at mcorwin@gfrlaw.com.

EMERGING COMPANIES COMMITTEE

The Emerging Companies Committee last met on January 11, 2006 for 90 minutes at the Baltimore offices of Whiteford, Taylor & Preston L.L.P. The primary focus of the meeting was reviewing a proposed table of contents and setting a timetable for the drafting of the Entrepreneur’s iAlmanac. The iAlmanac is intended to serve as a practical and comprehensive reference for emerging businesses generally. Additionally, the Committee discussed at length the technical, financial, and other issues concerning its immediate plans to host a blog to provide an electronic, accessible, and moderated discussion forum for topics relevant to practitioners representing emerging businesses.

The next Committee meeting will be held on **February 22, 2007** at the Baltimore offices of Whiteford, Taylor & Preston from 8:00 to 9:30 a.m. Members of the Business Section interested in joining the Committee are encouraged to do so and may contact Frank Jones (fjones@wtplaw.com; 410-347-8707) or James Harris (charris@saul.com; 410-332-8763) for detail.

Section Council Roster . . .

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